(16)

No. 222

In the Supreme Court of the United States

October Term, 1943.

SENECA COAL AND COKE COMPANY, *Petitioner,*

vs.

MILO LOFTON, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HUNTER L. JOHNSON,
KARL H. MUELLER,
Attorneys for Petitioner.

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PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable The Supreme Court of the United States:

The petition of The Seneca Coal & Coke Company, a corporation, designated in said cause below as Seneca Coal and Coke Company, a corporation, respectfully shows to this Honorable Court:

1. That the case is an action at law brought by the respondent, as plaintiff, against petitioner, as defendant, in the District Court of the United States for the Northern District of Oklahoma, for the recovery of overtime compensation under the provisions of the Fair Labor Standards Act of 1938, and for liquidated damages and attorney fees. The trial was by the court without a jury, and the judgment was for the respondent.

2. Petitioner, as appellant, prosecuted an appeal from such judgment to the Circuit Court of Appeals for the Tenth Circuit, which affirmed the judgment of the lower court by its own judgment entered May 29, 1943 (R. 87). On June 28, 1943, petitioner filed and presented its petition for rehearing, which was denied by the Circuit Court of Appeals on July 8, 1943 (R. 92).

3. The appeal involved construction of Section 7(a) and Section 16(b), of the Fair Labor Standards Act of 1938, 29 U. S. C. A. 201, *et seq.*, the court holding and deciding:

> *(a)* That the Fair Labor Standards Act does not permit to be supplied by implication or construction omission of any employment contract to provide expressly a "regular rate" of wage for straight time hours, and division of the agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively, but in all such cases requires the regular rate to be determined by dividing the total weekly compensation by the total weekly hours worked, and to be applied to the maximum lawful straight time hours, with one and one-half times such rate applied to all hours in excess thereof.
>
> *(b)* That the Fair Labor Standards Act does not permit to be supplied by implication or construction such an omission in an express employment contract, which the court found to have provided expressly a fixed and definite salary for a fixed and invariable number of weekly work hours (which includes statutory straight time and overtime hours), in the making and performance of which by employer and employee the court found that *(1)* both parties intended such agreed salary to be compensation in full for all such agreed work hours, *(2)* neither of the parties intended to violate the law, and *(3)* both of the parties, though believing that the employment was not subject to the Fair Labor Standards Act, in good faith believed that if subject to the Act, the contract, employment and pay-

ments complied with the Act, and so considered and treated the matter for nearly two years; and in effect that, under such circumstances, a method or formula is fictional and inapplicable, which is based upon the presumption or implication that the parties in their contract intended as straight time weekly work hours the only number which would be lawful in the absence of an expressly agreed smaller number of such hours, namely, the maximum statutory straight time weekly work hours; and that the regular rate must be determined by dividing the total weekly compensation by the total weekly hours worked, that such regular rate must be applied to such maximum statutory straight time weekly work hours, as the applicable number of straight time weekly work hours, and that one and one-half times such regular rate must be applied to all hours in excess thereof.

(c) That the Fair Labor Standards Act is violated, so as to give mandatory immediate rise to liability for liquidated damages in an additional amount equal to the overtime compensation, by failure of the employer to pay overtime compensation in regular course of employment (presumably, or or before the regular pay day, a semi-monthly pay day in this case), and that the statute permits no excuse or relief from either the accrual or enforcement of such liability.

4. The appeal also involved the *stare decisis* effect of decisions of this court, particularly the decision in the case of *Carter* v. *Carter Coal Company,* 298 U. S. 238, construing the commerce clause of the Constitution of the United States, and the federal powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and holding that under the Constitution the Congress is without power to regulate the bituminous coal industry, here involved, or wages and hours in that industry, the Circuit Court of Appeals holding and deciding: that such decision of this court not having decided the constitutionality of the Fair Labor Standards Act, which had not

been enacted at the time, such decision by this court does not have *stare decisis* effect upon the statutory liability under that Act for liquidated damages in an amount equal to overtime compensation.

5. A certified copy and transcript of the record of said case in the Circuit Court of Appeals for the Tenth Circuit is hereby furnished and accompanies this application and petition as an exhibit hereto.

Summary Statement of the Issues and Facts Involved.

Neither party took the evidence to the Circuit Court of Appeals. Both parties have relied upon, and neither controverted for the purposes of such appeal, the facts as found by the trial court. Thus the following facts are not in dispute:

1. Petitioner operated what is known as a strip coal mine located in Oklahoma, in a strip coal mine coal being removed by surface operations of power shovel. Respondent was employed by petitioner as night watchman at said mine. The employment commenced prior to the taking effect of the Fair Labor Standards Act on October 24, 1938, and continued until January 8, 1941.

2. The court found that the contract of employment was an expressed oral agreement that petitioner employed respondent to work as night watchman, fourteen hours per day for six days per week from October 24, 1938, to April 30, 1940, and twelve hours per day for six days per week thereafter until January 8, 1941, at a salary of $150 per month, plus 80c per day worked, as monthly salary (Finding 12, R. 68); that such salary was mathematically susceptible of being calculated or assimilated into, and was exactly sufficient to pay one definite hourly wage rate for the statutory maximum straight time weekly work hours as regular hours, for each of the periods of said employment, to-

gether with 1½ times such hourly wage rate for all hours worked each week in excess of the statutory maximum hours during such period (and only one such hourly wage rate for each such period, one and one-half times which will mathematically equal the overtime worked), such mathematically calculable rate for each period being expressly found (Finding 16, R. 68-69) and being in excess of the statutory minimum wage; the court further finding that if the said employment contract had expressly provided for such division and application of the monthly salary, the employment agreement, and the payments thereunder, would have been in compliance with the minimum wage, maximum hours and overtime provisions of the Fair Labor Standard Act, and that respondent would have received exactly the same compensation he did receive (Finding 16, R. 69), which was exactly the agreed compensation.

The employment contract, as expressed and as interpreted by the acts of the parties, did not require respondent to work, and he did not work, for the agreed salary, in excess of the agreed hours or days (Finding 14, R. 68).

The court found that in making and performing the said employment contract neither respondent nor petitioner intended to violate the law (Finding 15, R. 68), and intended that said monthly salary compensate respondent in full for all hours worked by him to the extent of the agreed hours per day (Finding 13, R. 68); and that both parties in good faith believed that the employment was not subject to the Fair Labor Standards Act, but that both believed in good faith that if subject to the act, the contract, employment and payments complied with the act, and that no question arose between them for more than two years (Finding 25, R. 72-73), and until after petitioner, in view of uncertainty in court decisions, voluntarily and without suggestion or demand by respondent, computed in manner held by

the lower court to have been proper, and paid to respondent a total sum of $978.39 (concluded December 27, 1940) as applicable to his overtime compensation if not already legally paid (Findings 18 and 19, R. 69-70), which the court found paid respondent's statutory overtime compensation in full, except $19.89 representing overtime for half-hour lunch periods, which the court held were erroneously deducted by petitioner in making such settlements (Findings 19, 20, 21 and 23, R. 70 and 72).

The lower court concluded as matters of law, that the Fair Labor Standards Act does not permit to be supplied by implication an omission of an express employment contract to provide expressly for division of agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively (Conclusion 3, R. 73); that under the contract respondent worked in excess of the statutory maximum number of hours permitted to be worked without overtime compensation, so as to become entitled to overtime compensation for the excess number of work hours (Conclusion 4, R. 74); that, in applying the wage and hour provisions of the Fair Labor Standards Act, the agreed monthly salary should be mathematically translated into a regular hourly rate of pay by multiplying by 12 the $150.00 part of said salary and by 313 (365 days less 52 Sundays) the 80c per day part of such salary, adding together the results to obtain the annual salary, dividing such annual salary by 52 to obtain a weekly salary of $39.43, dividing such assimilated weekly salary by the total number of hours worked each week to obtain a regular hourly rate of pay for the statutory maximum regular weekly work hours during such week, and multiplying such regular rate by 1½ to obtain the overtime rate for such excess hours (Conclusion 5, R. 74); and the court accordingly concluded as a matter of law that respondent was entitled to, and was paid, overtime

compensation in the total amount of $978.39 (exclusive of $19.89 for overtime compensation for the half-hour lunch periods), and then concluded that respondent was entitled to an additional amount equal to said sum of $978.39 as liquidated damages, which the court found had not been paid (Findings 23, 24, 25 and 26, R. 72-73).

The court found (Finding 25, R. 72) that the delay in payment of the said $978.39, paid by petitioner to respondent as payment of overtime compensation, was due to the belief of both parties in good faith that the employment of respondent was not subject to the Fair Labor Standards Act, and their belief in good faith that if it was subject to the Act, the contract, employment and payments complied with the Act; that during the time of such delay both questions were the subject of great confusion of opinion among the citizenship, the bar and the courts of the nation; and that the payments of the said sum of $978.39, as overtime compensation, were made by petitioner voluntarily, and at its own suggestion, as the interpretation of the Act by courts became more clear, and without suggestion or demand by respondent, and before suit, all in good faith on the part of both parties, and without intent of either of them to violate the law; and that (Finding No. 7, R. 65-66) petitioner relied upon legal counsel and the decision of the Supreme Court in the case of *Carter* v. *Carter Coal Company* in good faith, and without intent to violate the law.

The trial court rendered judgment in accordance with its said findings and conclusions. The judgment was affirmed by the Circuit Court of Appeals, which accepted the findings of the trial court as setting forth the facts.

Reasons Relied on for the Allowance of *Certiorari*.

The case was decided by the Circuit Court of Appeals contrary to the argument and contention of the petitioner, to the converse of the above stated holdings of that court, particularly as follows:

1. That when there are present in an express employment contract and the facts and circumstances incident thereto the necessary elements from which unexpressed contractual elements may be implied under the law of contracts in order to make the contract lawful, operative, definite, reasonable and capable of being carried into effect, without violating the intention of the parties, the Fair Labor Standards Act does not prevent or preclude but permits and requires such implication and construction, and that in such cases the formula approved and adopted by the court below is inapplicable and artificial when it violates the intention of the parties and destroys the expressed terms of the contract.

2. That under the facts found in this case, the Fair Labor Standards Act permits and requires to be supplied by implication or construction, the contractual elements found by the court not to have been expressed in the express employment contract, in accordance with the law of contracts and particularly the provisions of Sections 15-159 and 15-172, Oklahoma Statutes 1941; and that, in view of the definiteness and invariableness of the agreed compensation and the agreed work hours, and the intent of the parties that the salary compensate respondent in full for all hours worked, without violating the law, and with intent to conform to the Fair Labor Standards Act if subject thereto, and the mutual satisfaction of the parties with such arrangement for nearly two years, it is permissible, and not fictitious, to presume that the parties intended the only thing that would accomplish all such intent, namely, that

the statutory maximum straight time weekly work hours are the applicable straight time weekly work hours, under which presumption the intended full compensation and legality result mathematically.

3. That the Fair Labor Standards Act is not necessarily violated, so as to give mandatory immediate rise to liability for liquidated damages, by failure of the employer on or before the regular pay day to pay overtime compensation earned during the pay period; that time for legal performance of the obligation to pay overtime compensation under the Fair Labor Standards Act, not being expressly fixed by the Act, in the absence of contract fixing a time that is reasonable, is a reasonable time, which may be deferred or extended by the parties in the absence of bad faith amounting to intent, express or implied, thereby to violate the Act, and reasonableness of time must be determined by the circumstances of the particular case; and if the payment thereof, whenever due in the original regular course of employment, is delayed due to the belief of both parties in good faith that such payment is not required or has been made, and the employer discovers the error and makes such payment without suggestion or demand by the employee, the statute has been satisfied and no liability arises for liquidated damages by reason of such delay; and that the liquidated damages do not arise until their statutory component measure and purpose at least substantially come into being.

4. That the liquidated damages under the Fair Labor Standards Act, while not a penalty, being in the nature of a penalty, as designed to compel or inhibit action, were not enforceable during the effectiveness and on account of the *stare decisis* effect of, and against one relying on, the decision of this Court in the case of *Carter* v. *Carter Coal Company*, 298 U. S. 238, which construed the commerce clause of the Constitution of the United States and the federal

powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and held that under the Constitution the federal government and its Congress are without power to regulate the bituminous coal industry, or wages and hours in that industry.

5. The holding and decision of the Circuit Court of Appeals therefore presents important questions of federal law, which have not been, but should be, settled by this Court, and decided federal questions in a way probably in conflict with applicable decisions of this Court.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2642, *Seneca Coal and Coke Company, a corporation, appellant,* v. *Milo Lofton, appellee,* and that the said cause and judgment of the said Circuit Court of Appeals for the Tenth Circuit may be reviewed and determined by this Honorable Court as provided by law, or that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate, and that the said judgment of the Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court; and your petitioner will ever pray.

THE SENECA COAL & COKE COMPANY,
Petitioner,

By HUNTER L. JOHNSON,
Attorney for Petitioner.

Of Counsel:
KARL H. MUELLER.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

The judgment of the District Court is found at pages 75-76 of the record, and the opinion and judgment of the Circuit Court of Appeals, not yet published, is found on page 87 of the record.

Statement of the Case.

This has already been stated in the preceding petition, which is hereby adopted and made a part of this brief.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding and deciding that the Fair Labor Standards Act does not permit to be supplied by implication or construction omission of any employment contract to provide expressly a "regular rate" of wage for straight time hours, and division of the agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively, but in all such cases requires the regular rate to be determined by dividing the total weekly compensation by the total weekly hours worked, and to be applied to the maximum lawful straight time hours, with one and one-half times such rate applied to all hours in excess thereof.

2. The Circuit Court of Appeals erred in holding and deciding that the Fair Labor Standards Act does not permit to be supplied by implication or construction such an omission in an express employment contract, which the court found to have provided expressly a fixed and definite salary for a fixed and invariable number of weekly work hours (which includes statutory straight time and overtime

hours), in the making and performance of which by employer and employee the court found that *(1)* both parties intended such agreed salary to be compensation in full for all such agreed work hours, *(2)* neither of the parties intended to violate the law, and *(3)* both of the parties, though believing that the employment was not subject to the Fair Labor Standards Act, in good faith believed that if subject to the Act, the contract, employment and payments complied with the Act, and so considered and treated the matter for nearly two years; and in effect that, under such circumstances, a method or formula is fictional and inapplicable, which is based upon the presumption or implication that the parties in their contract intended as straight time weekly work hours the only number which would be lawful in the absence of an expressly agreed smaller number of such hours, namely, the maximum statutory straight time weekly work hours; and that the regular rate must be determined by dividing the total weekly compensation by the total weekly hours worked, that such regular rate must be applied to such maximum statutory straight time weekly work hours, as the applicable number of straight time weekly work hours, and that one and one-half times such regular rate must be applied to all hours in excess thereof.

3. The Circuit Court of Appeals erred in holding and deciding that the Fair Labor Standards Act is violated, so as to give mandatory immediate rise to liability for liquidated damages in an additional amount equal to the overtime compensation, by failure of the employer to pay overtime compensation in regular course of employment (presumably, on or before the regular pay day, a semi-monthly pay day in this case), and that the statute permits no excuse or relief from either the accrual or enforcement of such liability.

4. The Circuit Court of Appeals erred in holding and deciding that the decision of this Court in the case of *Carter*

v. *Carter Coal Company,* 298 U. S. 238, construing the commerce clause of the Constitution of the United States, and the federal powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and holding that under the Constitution the Congress is without power to regulate the bituminous coal industry, and wages and hours in that industry, does not have *stare decisis* effect upon the statutory liability for liquidated damages under the Fair Labor Standards Act.

ARGUMENT.

Proposition I.

(Specification of Error No. 1.)

When there are present in an express employment contract and the facts and circumstances incident thereto the necessary elements from which unexpressed contractual elements may be implied under the law of contracts in order to make the contract lawful, operative, definite, reasonable and capable of being carried into effect, without violating the intention of the parties, the Fair Labor Standards Act does not prevent or preclude but permits and requires such implication and construction, and in such cases the formula approved and adopted by the court below is inapplicable and artificial when it violates the intention of the parties and destroys the expressed terms of the contract.

In support of its said holding and decision contrary to this proposition, and its statement that the law is now so settled beyond dispute, the Circuit Court of Appeals cited the following decisions:

Overnight Motor Transportation Co. v. *Missel,* 316 U. S. 572, 62 Sup. Ct. 1216, 86 L. ed. 1682;

Patsy Oil & Gas Co. v. *Roberts,* 132 F. (2d) 826;

Warren-Bradshaw Drilling Co. v. *Hall,* 124 F. (2d) 42, aff. 317 U. S. 88, 87 L. ed. 99 (Adv. Sheet);

Mid-Continent Pipe Line Co. v. *Hargrave,* 129 F. (2d) 655;
Walling v. *Stone,* 131 F. (2d) 461;
St. John v. *Brown,* 38 F. Supp. 385.

Petitioner respectfully submits that neither of the above decisions from this Court had the effect so attributed to them, and that the decision of this Court in *Overnight Motor Transportation Co.* v. *Missel, supra,* below referred to as the *Missel* case, was very definitely to the contrary, while the decision of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall,* below referred to as the *Warren-Bradshaw* case, involved no such general proposition of law, but only implication from the facts in that case, and imported that implication arises in a proper case.

In the *Missel* case was involved contract for a weekly wage for variable or fluctuating work hours under the Fair Labor Standards Act. This Court announced rule and formula applicable thereto, and distinguished that case from the case of *L. Metcalf Walling, etc.,* v. *A. H. Belo Corp.,* 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. ed. 1716, below referred to as the *Belo* case, and in so doing stated the rule and formula (used by the lower courts in this case) applicable to contract for fixed weekly wage for regular contract hours which are the actual hours worked, in cases where the contract does not provide, as did the contract in the *Belo* case, a regular rate of wage for straight time hours and division of the agreed work time and agreed salaried compensation into straight time and overtime, and separate compensation for straight time and overtime, respectively. As we understand each such holding, in it this Court dealt with the actual contract, and not with the question of implication of the allocation in the contract.

However, there was part of the opinion in the *Missel* case devoted by this Court to such question of implication.

In the *Missel* case, petitioner contended for implication, and in disposing of that contention this Court said:

> "Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or 'regular rate,' regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional, for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law."

The holding of the Circuit Court of Appeals in the present case seems to us to be in conflict with what appears to be the clear purport of the last above quoted language of this Court. This Court did not say in the *Missel* case that the presumption and construction there contended for would not be indulged in any case. The Court pointed out the absence of a contractual element necessary to justify and support the implication and construction contended for, namely, that there was no limit upon the hours of work petitioner in that case could have required for the agreed wage, under the contract; and held that this deficiency in its terms precluded mending the contract by implication. It is manifest that the clear purport of the said language of this Court is, that, although such process of mending by implication, well known to the law of contracts, could not be used in that case for the reasons stated, absent such deficiencies, implication will lie in an employment contract under the Fair Labor Standards Act, as in any and all other contracts.

In the *Warren-Bradshaw* case, this Court said that it was concerned in the application of the Fair Labor Standards Act "to a particular situation." In the last paragraph of the opinion, this Court refused petitioner's contention that it complied with the overtime compensation requirements of the Act because respondents received wages in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours, which wages respondents impliedly agreed included overtime compensation by accepting them. The same paragraph of the opinion stated that respondents were employed on the basis of an eight-hour day and regularly worked seven days a week, receiving fixed wages and that there was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours. The opinion did not give this Court's reason for rejection of the implication, otherwise than to say that the argument was similar to arguments squarely rejected in the *Missel* case.

That, in the *Warren-Bradshaw* case, this Court was dealing with the same contractual deficiencies as in the *Missel* case, is evidenced by the following quotation from the brief accompanying the petition for writ of *certiorari* (page 13) in the *Warren-Bradshaw* case, to-wit:

> "In so far as there was evidence as to how the respondents went to work, it appears that they merely joined themselves to a rotary drilling crew without any express agreement as to wages. Each of them had in his mind that he would work eight hours each day, seven days per week, until the rotary drilling on that well was finished, and he expected to be paid a certain amount for his labor on the well (R. 58). He was paid for his work in accordance with that expectation, and the payment he received was in each instance more than sufficient to provide for a basic wage scale and time and a half for overtime as provided by the Fair Labor Standards Act."

Thus, in the *Warren-Bradshaw* case it appears that this Court was called upon to imply, not merely the intention of the parties in an express contract, but to imply the entire contract, when as a matter of fact the employee did not have a contract, either express or implied, for even one week's work, or for a time long enought to accumulate statutory overtime, but worked by the day for a daily wage, and no intent or fact was found from which it could possibly be inferred that the compensation was intended by the parties to cover overtime hours of work.

The case of *Mid-Continent Pipe Line Co.* v. *Hargrave, supra,* involved employees who were employed to work at a daily wage. It presents the same basic deficiencies that are present in the *Warren-Bradshaw* case and is ruled by the same principle.

In the case of *Walling* v. *Stone, supra,* the contract was for a fixed weekly salary regardless of the number of hours worked in a week. The deficiencies in that case, therefore, are the same as in the *Missel* case with the same result.

In the case of *St. John* v. *Brown, supra,* there was no showing or finding as in the instant case that the parties intended and agreed that the agreed compensation was in full payment for the agreed work. The employer there contended that if the agreed compensation was susceptible of allocation so as to meet the minimum wage requirements of the Act it complied with the Act. Petitioner has made no such contention in this case. Mere susceptibility of such an allocation standing alone is not sufficient to warrant or support the implication. However, when such an allocation is rooted in the agreement and intention of the parties, as in this case, and is necessary to the effectuation of that intent and to the preservation and effectuation of the expressed terms of the agreement an entirely different case is presented and one in which such allocation can and should be implied.

In *Patsy Oil & Gas Co.* v. *Roberts, supra,* the implication upon which appellant relied, and which was not sustained by the court, was based upon a premise which had no foundation in the facts of the case and which was actually contrary thereto. When limited to the facts of that particular case the opinion and holding of the Circuit Court of Appeals may be understandable. However, the language used is susceptible of the interpretation that the court held or intended to hold that the regular rate of pay and the allocation of the agreed work time into straight time and overtime and the allocation of agreed compensation into straight time pay and overtime pay must be expressed in words by the parties and if not so expressed cannot be implied under any circumstances so as to give effect to the intention of the parties and the terms of the contract upon which express agreement has been had. That it intended to and did so hold and decide in that case may be indicated by the court's citation of its opinion in that case as authority for its holding in this case. We respectfully submit that if such was the holding in the *Patsy* case, it constitutes and is error similar to that of which we complain in this case.

Under our presentation of the immediately succeeding proposition, we present the situation in this case, as illustrative of a case in which the necessary contractual elements are present, from which unexpressed contractual elements may be implied under the law of contracts.

We respectfully submit that it being clear from the decisions of this Court in the *Missel, Belo* and *Warren-Bradshaw* cases that contracts between employer and employee are recognized by the Fair Labor Standards Act, the fact that a Circuit Court of Appeals in effect has construed the decisions of this Court to mean that that Act emasculates the law of contracts as applied to employment, by stripping it of implication, the life-giving element of every contract,

treats employment contracts as though they existed in a vacuum apart from the general body of the law, and contrary to universal law sacrifices substance on the altar of form, renders it important that that question be settled by this Court.

There is inherent the practical question of transcendant importance, whether the security of industry and labor shall require that in each of the multitudinous millions of employment contracts, large and small, of the immediate and far future, there must be express contract, even in writing, because of the absence of implication necessary to be so carefully made as to require the services of skillful attorneys; or whether under the Fair Labor Standards Act, as does citizenship under other statutes, industry and labor may live and succeed together in the fold of familiar, traditional legal principles and methods of contracting.

Proposition II.

(Specification of Error No. 2.)

Under the facts found in this case, the Fair Labor Standards Act permits and requires to be supplied by implication or construction, the contractual elements found by the court not to have been expressed in the express employment contract, in accordance with the law of contracts and particularly the provisions of Sections 15-159 and 15-172, Oklahoma Statutes 1941; and, in view of the definiteness and invariableness of the agreed compensation and the agreed work hours, and the intent of the parties that the salary compensate respondent in full for all hours worked, without violating the law, and with intent to conform to the Fair Labor Standards Act if subject thereto, and the mutual satisfaction of the parties with such arrangement for nearly two years, it is permissible, and not fictitious, to presume that the parties intended the only thing that would accomplish all such intent, namely, that the statutory maximum straight time weekly work hours are the applicable straight time weekly work hours, under

which presumption the intended full compensation and legality result mathematically.

The findings of facts and intent, referred to in the above proposition are set forth with record references in the statement in our petition for *certiorari,* and will not be repeated here.

There is neither the total absence of contract, nor the absence of contract for fixed wage for fixed hours for fixed period (sufficient to accumulate overtime), as in the *Warren-Bradshaw* case, or elements absent in other cases cited by the Circuit Court of Appeals, as hereinabove noted.

There are not absent, but are present, the elements indicated in our quotation from the *Missel* case under Proposition No. 1 as essential to implication, and more. There is contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage. There is also definite finding (Finding 14, R. 68) that the express employment contract did not require plaintiff to work for the agreed salary in excess of the agreed hours or days. In addition to these elements mentioned in the *Missel* quotation, there are express findings, conclusive on appeal and in this proceeding (Finding 25, R. 72), that both parties believed in good faith that the employment was not subject to the Fair Labor Standards Act and that if it was subject to the Act, the contract, employment and payments complied with the Act (and therefore, necessarily, acted with reference to the Act); that (Finding 15, R. 68) in making and performing the employment contract, neither petitioner nor respondent intended to violate the law (necessarily thus having reference to the Fair Labor Standards Act, as above stated); that (so intending), (Finding 13, R. 68) in making and performing the express employment contract, both parties intended that the said monthly salary compensate respondent in full for all time worked by him to the extent of

the agreed hours per day; and, with this express contract, and these elements of intent in mind, the findings and the entire case disclose that both parties were satisfied with the arrangement over a period of nearly two years.

Section 7, Fair Labor Standards Act, provides that no employer shall * * * employ any of his employees * * * for a work week longer than the specified maximum statutory straight time hours, unless such employee receives compensation for his employment " in excess of the hours above specified" at a rate of not less than one and one-half times the regular rate at which he is employed.

It is in effect expressly and conclusively found that in making and performing the employment contract, the parties did not intend to violate that provision, and thought that they were complying with it if it were applicable. They did not expressly agree to a regular rate or number of straight time hours, but are conclusively found in effect to have intended that which would be legal and comply with the statute, and apply the salary as full compensation for the agreed hours of work, and thereby effectuate their intention and the express terms of the contract. They therefore conclusively agreed that the salary was intended to pay for legal straight time hours, which were the statutory maximum straight time hours (44 hours the first year, 42 hours the second year, 40 hours the third year) at such rate of wage (determinable by mathematics) as would pay therefor and leave just exactly sufficient of the salary to equal and pay for the overtime hours at one and one-half times such rate. If they are presumed not to have intended the maximum straight time weekly work hours as the straight time weekly work hours, then they intended to violate the statute, but the findings are that they did not intend to violate the statute, and therefore necessarily that they intended the salary to be applied accordingly, if the Act were applicable.

We are unable to conceive how there could be more definiteness, even by expression in words. Given the express contractual elements and the intentions of the parties in this case, the allocation of the compensation in conformity therewith and with the law is a simple and infallible mathematical process. It is necessary only to presume that the straight time hours are the maximum legal straight time hours under the Act. All other elements necessary and incident to such allocation are found in the express contract and intention of the parties and in the express terms of the law, and the aforesaid presumption necessarily inheres therein.

Indeed it is that very same presumption or implication that is used as a basis for the formula or method of allocation approved by the courts below. Having indulged that presumption, the method or formula approved below departs from the expressed terms and intentions of the parties and resorting to fiction as a substitute therefor reaches a result which is contrary to such expressed terms, violative of the intention of the parties, and destructive of the contract.

The method of allocation or formula (footnote 2, opinion below, R. 84), which petitioner contends inheres in the contract and intentions of the parties, and effectuates the same in conformity with the law, is as follows:

Y = Hourly rate for statutory straight time.
1½Y = Hourly rate for statutory overtime.
84 = Total weekly hours worked each week first year (the agreed hours).
44 = Weekly hours statutory straight time.
84 — 44 = 40 = Weekly hours statutory overtime.
44 × Y = 44Y = Pay for statutory straight time.
1½ Y × 40 (statutory overtime) = 60Y = Pay for statutory overtime.

$$
\begin{aligned}
44\ Y + 60Y &= \$39.43 \\
104Y &= 39.43 \\
Y &= .3791 \text{ hourly rate 44 hours statutory weekly straight time.} \\
1\tfrac{1}{2}Y &= .5686 \text{ hourly rate statutory overtime.}
\end{aligned}
$$

With all due respect to the Circuit Court of Appeals, that court evidently overlooks the fact that the above formula was neither urged nor rejected in *Patsy Oil & Gas Co.* v. *Roberts,* 132 F. (2d) 826 (10 C. C. A.), as stated in footnote 2, page 6 (R. 84), opinion of the Circuit Court of Appeals in this case. The same formula was not used at all in the *Patsy* case. In that case the employer asked the court to imply an agreement for a longer number of hours than the agreed or worked hours as the basis for the formula contended for in that case, which, of course, could not be done. We are asking the Court to enforce expressly found contractual terms and intent, which applies the salary to the only number of hours possible to such intent, as straight time hours, namely the legal or statutory maximum straight time hours.

In addition to the foregoing, and in addition to the well known principles of contractual interpretation, too well known to require citation of authority here, we urged upon the trial court and the Circuit Court of Appeals, and here present, Sections 15-159 and 15-172, Oklahoma Statutes 1941.

The trial court found (Finding 17, R. 69) that the employment contract was made, and was intended to be performed, and was performed, in the State of Oklahoma. 28 U. S. C. 725* makes the state laws of Oklahoma rule of decision under such circumstances.

*Quoted in the Appendix.

Section 15-159, Oklahoma Statutes 1941, being Section 953, Revised Laws 1910, is as follows:

> "*Interpretation Favors Validity.* A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

Section 15-172, Oklahoma Statutes 1941, being Section 966, Revised Laws 1910, reads as follows:

> "*Necessary Incidents Implied, When.* All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."

These statutes were parts of the employment contract. In addition to these Oklahoma statutes, the general law is that where a contract is fairly susceptible of two constructions, one of which will render it lawful, and other unlawful, the former will be adopted. *Fairbanks, Morse & Co.* v. *City of Wagoner, Oklahoma,* (C. C. A. 10) 81 F. (2d) 209 (218); *Great Northern Railway Co.* v. *Delmar Co.,* 283 U. S. 686, 691, 51 S. Ct. 579, 75 L. ed. 1349.

The decisions of the trial court and the Circuit Court of Appeals denied consideration to both the above general principles and the Oklahoma Statutes, apparently on the theory that this Court had held against implication and that the Fair Labor Standards Act does not permit implication.

If the writ of *certiorari* is granted, we shall wish to brief the matter more fully; but assume that the foregoing is sufficient to present to this Court our petition for the writ, based on the contention that the lower courts erred in refusing implication under the facts in this case.

We respectfully submit that, in addition to it being of

prime importance that this Court settle the question of implication generally under the Fair Labor Standards Act, it is likewise important that this Court determine and settle the same in this case, for the reason that it presents with unusual clarity and directness, these and other herein presented important questions of federal law, decision of which by this Court is necessary to clarify the law and of vital public concern.

PROPOSITION III.

(Specification of Error No. 3.)

The Fair Labor Standards Act is not necessarily violated, so as to give mandatory immediate rise to liability for liquidated damages in an additional amount equal to the overtime compensation earned during a pay period, by failure of the employer on or before the regular pay day, or at any particular time, to pay overtime compensation earned during a pay period; and under the facts found by the lower courts, was not violated in this case with respect to the overtime compensation paid.

This proposition will only be applicable if the Court denies our Propositions I and II, and in that event will be applicable to the part of the judgment of the trial court for liquidated damages in an amount equal to overtime compensation calculated and actually paid by petitioner, voluntarily on petitioner's own initiative, prior to demand or suit, and prior to any question being raised, in the effort to make sure that, in a doubtful situation, it was not violating the statute; and will not be applicable to that part of the judgment composed of $19.89 representing overtime for half hour lunch periods, which the court held were erroneously deducted by petitioner in its said settlements, and $19.89 liquidated damages, in an equal amount.

The Fair Labor Standards Act does not provide when the employee shall receive the overtime compensation. Sec-

tions 7(a) and 16(b) (the latter the liquidated damage section)*, same Act, construed together, do not provide a time within which, if overtime compensation is not so received, the statute is violated and liquidated damage liability arises. We anticipate that if petitioner is held to have contracted for overtime compensation, our first two propositions will be sustained, and this proposition will not be applicable. If petitioner be held not to have contracted for overtime compensation, then likewise there would be no *contractual* period within which the overtime compensation was required to be paid, before liquidated damage liability would arise.

This proposition does not raise the question either that *(a)* violation of the Act does not give rise to liquidated damages, or *(b)* that liquidated damages is not mandatory, but recognizes that those questions have been settled in the affirmative; nor does it present a contention, as the opinion of the Circuit Court of Appeals imports, that good faith violation of the statute can be excused. Petitioner at all times has contended that the statute was not violated.

This proposition raises the question as to whether the provisions of the Fair Labor Standards Act, and particularly of the liquidated damage provision in Section 16, are rigid, and force themselves inevitably on the contracting parties to employment, so that the statute is automatically violated by failure of the employer to pay, and the employee to receive, overtime compensation, or even any part of his compensation, on agreed or customary pay days, or at or during any other particular time, without regard to the agreement or acts of the parties. We contend in the negative.

This proposition also raises the incidental, but possibly determinative, questions as to whether the Fair Labor

*Quoted in the Appendix.

Standards Act permits the parties to an employment contract, in the absence of bad faith, by their own act, by agreement, or by other act or omission under general principles of law and equity held to amount to agreement, to defer the time of payment of overtime compensation, so that the act is not violated by failure to pay it or receive it during such period of deferment, so as to give rise to liquidated damages. It also involves the subordinate contention that liquidated damage, being damage, does not arise until its component elements of injury, etc., arise. We submit that the Congress in the Fair Labor Standards Act intended new statutory rights and obligations subject to, and within the sphere of operation of, legal and equitable principles embedded in our system of government.

The principle of automatic violation on failure to pay before a time certain, would make the Act rigid, arbitrary, despotic, and harmful. It seems safe to assume that the Congress did not intend that consummation, and deliberately provided against it by omitting to fix time certain when such payment must be made in order to avoid violating the statute.

The Congress was conversant with, and this Court knows without citation of authority, the principle that when statute or contract does not provide time, reasonable time is intended, that is, a time that is reasonable under all the circumstances of the particular case, which would take into consideration acts of commission, omission and stipulation by the parties. Such construction will accomplish all the purposes of the Act.

Statutes and contracts, as to their provisions for time, are construed somewhat in the same manner. This Court has even said:

> "When no specific time for the payment of money is fixed in a contract by which the same is to be paid by

one party to the other, in judgment of law, the same is payable on demand."

—*The President, Directors and Company of the Bank of Columbia* v. *Peter Hagner,* 1 Pet. 455, 7 L. ed. 219.

The test set up by Congress in the Fair Labor Standards Act is the payment of the overtime compensation and not the time of payment. Congress deliberately omitted the test of time, evidently to avoid rigidity, arbitrariness and despotism by applying a fixed and invariable rule to all cases. There is apparent the intention that each case should depend upon its circumstances and the agreements of the parties, within the fair purpose and intent of the legislation.

We shall not repeat our statements of the findings of the court as to reasons for delay of payment in this case, except briefly to say that the findings were that the delay in payment was due to the belief of both parties in good faith that the employment of respondent was not subject to the Fair Labor Standards Act, and their belief in good faith that, if it were subject to the Act, the contract, employment and payments complied with the Act, and that no question arose beween the parties for more than two years, and until after petitioner, in view of uncertainty in court decisions, voluntarily and without suggestion or demand by respondent, computed in manner held by the trial court to have been proper, and paid respondent all the overtime compensation that would have been due him if the employment were subject to the Act and the contract not in compliance with the Act (except a very small amount attributable to half hour lunch periods erroneously deducted), all during a time when the questions involved were the subject of great confusion of opinion among the citizenship, the bar and the courts of the nation, and without the intent of either party to violate the law, the petitioner relying upon legal

counsel and the decision of this Court in the case of *Carter* v. *Carter Coal Company*, 298 U. S. 238.

It was not just simply a case of mistake of law, as said by the Circuit Court of Appeals, for the findings included findings that both parties believed in good faith that if the employment were subject to the Fair Labor Standards Act, the contract, employment and payments complied with that Act, and that no overtime compensation was owing.

The effect of the holding of the lower courts would seem to be that Congress, in providing that no employer shall employ an employee for a work week longer than the specified maximum straight time hours, unless the employee receives time and one-half payment for the overtime, and that any employer who violates such provision shall be liable to the employee affected for liquidated damages in an additional amount equal to the unpaid overtime compensation, wrote between the lines the further provisions

> *even though neither employer nor employee knows that the employer is so doing, and believe in good faith that he is not so doing,*

or

> *regardless of the mutual intent and understanding of the parties,*

and

> *this provision shall be deemed violated if the overtime compensation is not paid on or before the regular pay day, which payment cannot be extended or deferred by any act or agreement of the parties regardless of their good faith or other circumstances*

and

> *The courts shall have the powers only of administrative bodies in the enforcement of this Act and the liquidated damages provided by it.*

Although this court has held that the liquidated damage is not a penalty, it has not been held that it is not in the na-

ture of a penalty. It is designed to inhibit and impel action. Section 16 of the Act allows it to the employee or employees "affected in the amount of * * * their unpaid overtime compensation," in an additional equal amount. The amount is rigid, but, as "damage," involves and is legislative measure of injury. The words "affected" and "unpaid" and "equal" require construction. This section, Section 16, omits time except, to say that one who violates Section 6 or Section 7 "shall" be liable. Counsel conceive that these expressions should be construed in the light of the above suggestions as to construction of Section 7. Congress evidently intended legislative duress against industrial duress, by compensation of an employee "affected" by industrial duress, and neither compensation nor punishment for mutual mistake or good faith, act or agreement, in which not even the imagination can conceive industrial duress or an employee being "affected" in an amount "equal" to his "unpaid" overtime compensation.

That the lower courts in this case did not pass upon the reasonableness of the time within which the overtime compensation was paid, is evidenced by their holding to the mandatory and arbitrary nature of the question of statutory violation and liquidated damages, and is indicated by the following quotation from the opinion of the Circuit Court of Appeals:

> "If any amount of good faith will excuse the payment of liquidated damages imposed by Section 16(b), it would seem wholly justified by the unchallenged factual findings of the trial court, but here the overtime compensation was not paid when due in the regular course of employment, because the parties did not believe it was owing. The violation was committed in good faith based upon a mistake of law."

We should not lose sight of the fact that in the above quoted holding the court overlooked the finding that the

parties believed in good faith that the contract, employment and payments complied with the Act.

While there was no express agreement for deferment of the overtime compensation, if due, the pay days were semi-monthly, and pay day after pay day for nearly two years one party paid and the other accepted the salary, with the good faith belief that they were complying with the Act, each such act establishing the intent of the parties in each similar act back to the beginning. If they had made written or spoken agreement to allocate the salary to time and overtime separately, in accordance with the intent thus shown, the lower courts would have concurred in their said ultimate intent. Their oft and long repeated acts wrote that intent, as well as assent to deferment of the overtime compensation, in particular circumstances which in other types of cases the courts would hold to amount to agreement, in good faith and without duress. If this would be true upon no other grounds, it would result from the principle of estoppel, pleaded and presented by petitioner in the lower courts.

In addition to our contention that the statute was not violated, it seems to us that Congress did not intend the employee to be "affected," that is, injured, in an amount as liquidated damages "equal" to "unpaid" overtime compensation, when the overtime compensation is paid under the circumstances above discussed.

That something is wrong with the theory of automatic violation, and automatic accrual of the liquidated damage liability, for non-payment at a time certain ought to be established if there can be one convincing illustration. It is difficult to conceive that Congress could have intended that the estate of a deceased individual employer would be irrevocably liable to liquidated damages, if he should die before pay day, so that the overtime compensation could not be legally paid without the delay incident to appointment of

administrator and other probate procedure incidental to payment of such claims, notice to creditors, maturity of claim payment time, etc., sometimes running as high as four months, as in Oklahoma.

We do not cite decisions on the point being presented, for the reason that we know of none. In its *Belo, Missel* and *Warren-Bradshaw* opinions, cited under our other propositions, this Court passed upon the liquidated damages being mandatory, not being a penalty, and other related questions. Opinions of lower courts read by us follow those holdings. The decision of the Circuit Court of Appeals in this case is the only decision we know that has passed upon the questions being presented, and it overlooked some of our contentions. If the writ is granted we desire to present the effect of various cases, but believe that the above is sufficient to point out to this Court the unsettled nature of the questions presented. We believe that it will be judicially known that they are causing great confusion among the public, the bar and the courts, and respectfully submit that they should be settled by this Court.

PROPOSITION IV.

(Specification of Error No. 4.)

Liquidated damages under the Fair Labor Standards Act, while not a penalty, being in the nature of a penalty, as designed to compel or inhibit action, were not enforceable during the effectiveness and on account of the *stare decisis* effect of, and against one relying on, the decision of this Court in the case of *Carter* v. *Carter Coal Company*, 298 U. S. 238, which construed the commerce clause of the Constitution of the United States and the federal powers thereunder, and the general welfare powers of the federal government and its Congress under the Constitution, and held that under the Constitution the federal government and its Congress are without power to regulate the bituminous coal industry, or wages and hours in that industry.

In our statement in the petition for *certiorari*, we stated

the findings of the lower court that in petitioner's joinder in the belief of both parties that the employment in this case, that of night watchman in a bituminous coal mine, was not subject to the Fair Labor Standards Act, and petitioner's delay in payment of overtime compensation if it was unpaid under the contract as hereinbefore presented, petitioner relied upon advice of counsel and decisions of this Court, including particularly the decision of this Court in *Carter* v. *Carter Coal Company,* 298 U. S. 238.

Petitioner contended in both lower courts, and contends here, that under such circumstances the liquidated damages were not recoverable against petitioner, by reason of the principle of *stare decisis.* The Circuit Court of Appeals denied this contention because the *Carter Coal* case decided the constitutionality of the Bituminous Coal Conservation Act of 1935, 49 Stat. 991, but did not decide the constitutionality of the Fair Labor Standards Act (See opinion, R. 86).

In the case of *James Walter Carter* v. *Carter Coal Company,* 298 U. S. 238, (Sup. Ct.) 80 L. ed. 1160, this Court, in construing the Constitution and legislative power thereunder, as digested in paragraphs 6, 14 and 20 to 23 of the syllabus or headnotes (which we ask leave to use in this brief, in the interest of brevity), held:

> "*6.* The power of Congress to regulate the bituminous coal industry must be found in some specific grant of power and cannot be based upon a supposed general power to protect the general public interest and the health and comfort of the people.
>
> "*14.* The Federal Constitution being the supreme law, the courts must refuse to give effect to a statute which conflicts with the Constitution.
>
> "*20.* That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to Federal regulation under the commerce clause.

"*21.* The power of Congress to regulate interstate commerce does not extend to the establishment of minimum wages, maximum hours of labor, the right of collective bargaining, and conditions of employment in the bituminous coal-mining industry.

"*22.* The power of Congress under the commerce clause is limited to matters directly affecting interstate or foreign commerce, and does not extend to matters the effect of which, whatever its extent, is indirect.

"*23.* The Federal regulatory power in matters relating to interstate commerce ceases when commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins."

In the early case of *William Marbury* v. *James Madison,* 1 Cranch 137, 2 L. ed. 60, this Court, speaking through Chief Justice JOHN MARSHALL, said:

"An Act of Congress repugnant to the Constitution cannot become a law."

In another early decision in the case of *George C. Dodge* v. *John M. Woolsey,* 18 How. 331, 15 L. ed. 401, this Court said:

"The Constitution provides the Supreme Court as a jurisdiction for its final interpretation and for the laws passed by Congress to give them equal operation in all states."

In the case of *Jackson* v. *Harris,* 43 Fed. Rep. (2d) 513, 516 (10th C. C. A.), the Circuit Court of Appeals, while holding that the general principle is that the decision of the highest appellate court of a jurisdiction overruling a former decision is retrospective in its operation and in effect declares that the former decision never was the law, said:

"There is a well settled exception to this general rule that, where contracts have been entered into or rights acquired upon the faith of a decision, they con-

not be impaired by a change of construction made by a subsequent decision. *Moore-Mansfield Co.* v. *Electrical I. Co.*, 234 U. S. 619, 623, 34 S. Ct. 941, 58 L. ed. 1503; *Douglass* v. *County of Pike*, 101 U. S. 677, 687, 25 L. ed. 968; *Green County* v. *Conness*, 109 U. S. 104, 3 S. Ct. 69, 27 L. ed. 872; *New Buffalo* v. *Cambria I. Co.*, 105 U. S. 73, 26 L. ed. 1024; *Nickoll* v. *Racine C. & S. Co.*, 194 Wis. 298, 216 N. W. 502, 504; *Wilkinson* v. *Wallace*, 192 N. C. 156, 134 S. E. 401, 402; *Hoven* v. *McCarthy Bros. Co.*, 163 Minn. 339, 204 N. W. 29; 15 C. J. 960, Sec. 358. See, also, *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451-452, 44 S. Ct. 197, 68 L. ed. 382."

We assume that it is not necessary to make more extensive citation of authorities on the principle of *stare decisis* for the purposes of this petition; and that we may be permitted to do so in briefs, if the writ is granted.

We point out that the *Carter Coal* case did not simply and only construe the Bituminous Coal Conservation Act of 1935, but construed the Constitution of the United States, and the federal and congressional powers thereunder, and lack of powers, as definitely and expressly applicable to the bituminous coal industry, and regulation of wages and hours therein. In our three-departmental form of government, the decisions of this Court are final and binding on citizens, until reversed by this Court. The constitutionality of the Fair Labor Standards Act was not decided by this Court until its decision in the case of *United States* v. *Darby*, 312 U. S. 100, 85 L. ed. 609, rendered February 3, 1941, prior to which all overtime compensation of the respondent in this case had been paid, even though it be held not to have been paid in the monthly salary, except the $19.89 attributable to erroneously deducted lunch time half hours.

The principle of *stare decisis* is a principle which conserves the stability and continuity of government, especially in a three-departmental government. One of those depart-

ments must be supreme and final in its interpretation of the Constitution. Citizenship must obey and respect the binding effect of the decisions of that department, *i. e.*, this Court, until they are reversed, not by Congress or one of the other departments, but by this Court.

We know of no decision except the decision of the courts below in this case that has presented or decided this question of *stare decisis* under the Fair Labor Standards Act. We submit that the opinion of the Circuit Court of Appeals on this point overlooks the fact that the bar contended for was based upon construction by this Court of the Constitution, and its express applicability to facts presented in this case.

It is not contended that *stare decisis* would bar either the minimum wage or overtime compensation, but only the liquidated damages, as legislative impulsion or inhibition in violation of the Constitution as at the time construed by this Court. Such legislative mandate or inhibition, until recognized by this Court, had the effect of requiring citizenship to disregard the Constitution as construed by this Court, and left citizenship without compass or guide in a dilemma in which anarchy would be inherent, without the principle of *stare decisis,* which should be held to bar the liquidated damages under the facts in this case.

Conclusion.

We respectfully submit that the writ of *certiorari* should be granted and that the judgment rendered against petitioner for violation of the Fair Labor Standards Act is unjust and should be reversed.

Respectfully submitted,

HUNTER L. JOHNSON,
KARL H. MUELLER,
Attorneys for Petitioner.

APPENDIX.

Sections 6, 7(a), and 16, Fair Labor Standards Act of 1938, 29 U. S. C. A. 201, *et seq.*, are as follows:

"§206 (§6). *Minimum Wages. (a)* Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates——

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under Section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under Section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act. (June 25, 1938, c. 676, §6, 52 Stat. 1062.)"

"§207 (§7). *Maximum Hours. (a)* No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his em-

ployment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

(b) * * *.

(c) * * *."

"§216 (§16). *Penalties. (a)* Any person who willfully violates any of the provisions of Section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action. (June 25, 1938, c. 676, § 16, 52 Stat. 1069."

Section 28 U. S. C. 725 is as follows:

"725. *Laws of States as Rules of Decision*—The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. (R. S., § 721.)"

(17)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 222

SENECA COAL AND COKE COMPANY, PETITIONER,

against

MILO LOFTON, RESPONDENT.

BRIEF OF *AMICUS CURIAE*

JOSEPH V. LANE, JR.,
Amicus Curiae.

ADRIAN C. LEIBY,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 182

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TABLE OF CASES CITED

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No. 222

SENECA COAL AND COKE COMPANY, PETITIONER,

v.

MILO LOFTON, RESPONDENT.

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

This brief *amicus curiae* is filed pursuant to the written consent of both parties to the case, in support of the petition for certiorari. Although the petition covers a number of important points, this brief will touch on only one. It is a point of such national importance that it ought to be settled by this Court.

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 136 Fed. (2d) 359 (Advance Sheets, August 23, 1943).

Question Presented

The only point with which the present brief is concerned is whether the Court below erred in holding that an employee is entitled to liquidated damages and attorney's fees under Section 16(b) of the Fair Labor Standards Act merely because overtime was not paid currently, even though the employee did not have to demand or sue for his overtime, the employer having voluntarily and in good faith paid the overtime compensation due to the employee as soon as it became known to either of them that such overtime was due.

Statute Involved

The pertinent parts of the Fair Labor Standards Act are printed in the appendix, at page 9.

Statement

So far as relevant to the problem discussed in this brief, the facts are these:

The respondent, Milo Lofton, was hired by the petitioner, Seneca Coal and Coke Company, prior to the enactment of the Fair Labor Standards Act. He was hired to act as a night watchman at a coal strip mine at a salary of about $170 a month. He was to be on duty fourteen hours a day (later twelve hours a day) for six days a week.

Both Seneca and Lofton believed in good faith that his employment was not subject to the Fair Labor Standards Act and both also believed in good faith that, if subject to the Act, the employment contract complied with its terms.

When interpretations of the Act by the courts indicated that Lofton's employment might be within the scope of the

Act, Seneca, voluntarily and without suggestion or demand by Lofton, paid him $978.39 as overtime compensation. After the voluntary payment by Seneca, Lofton brought this suit.

The courts below have decided that Lofton is entitled to an additional payment of $978.39 as "liquidated damages" together with an attorney's fee under Section 16(b) of the Act. (There was a miscalculation of less than $20.00 which, for present purposes, may be ignored.)

Specification of Error to Be Urged

If this Court issues the writ of certiorari to review the judgment below, it will be urged that the court below erred (insofar as the question here presented is concerned) in the following respects:

(1) There is no violation of Section 7(a) of the Fair Labor Standards Act where (to quote the Act) the "employee receives compensation for his employment in excess of the hours • • • specified at a rate not less than one and one-half times the regular rate at which he is employed." Liquidated damages are not payable where the Act has been voluntarily complied with.

(2) The intention of Congress as evidenced by the very language of the statute and as shown by the Congressional Record and the Committee Reports was that damages were not to be collectible in such a case unless the employee was compelled to bring suit to obtain his overtime compensation.

(3) The court below disregarded the administrative interpretations of the Act, including the interpretations of the Administrator's representatives who dealt with Seneca and Lofton.

Reasons for Granting the Writ

The lower Court has rendered a decision in conflict with the decision of another Circuit Court of Appeals. The Circuit Court of Appeals for the Fourth Circuit on September 16, 1943, in *Guess* v. *Montague* (unofficially reported in 6 Wages and Hours Reporter 934), ruled that where employees were "admittedly * * * paid the entire balance due them as minimum wages or overtime compensation, and * * * have accepted it as full settlement of all claims under the Act," they are not entitled to bring suit thereafter for liquidated damages or attorneys fees.

In next to the last paragraph of the decision, the Court summarized its conclusion in the following language:

> "The result of our holding is that where an employer who has paid less than the minimum wages and overtime compensation prescribed by the Act makes settlement with the employee for the full amount due thereunder and the employee accepts same in full discharge and satisfaction of all claims against the employer, there is an end of liability, and the employer may not be harassed by further litigation. The condition, however, is that the employer pay the full amount of the balance of minimum wages and overtime compensation due. If he pays less than this, the settlement constitutes no bar. This rule, we think, is in strict accord with the provisions of the Act and of the public policy upon which it is based. It will encourage employers to settle claims for unpaid minimum wages and overtime compensation, with assurance that when a full and fair settlement is made there will be no danger of further liability. On the other hand, it will preserve the threat of recovery of liquidated damages if full payment of minimum wages and overtime compensation, as required by the Act, is not made. In

other words, it will encourage compliance with the law and minimize the opportunity to take unjust advantage of its provisions."

Contrast the opinion of the Tenth Circuit in the present case (p. 363):

> "* * * Concededly, the employer acted in the good faith belief that the employment was not covered by the Act, or that the employment contract fully complied with its requirements, and when it became reasonably apparent that the employment did come within the Act, the correct amount of overtime compensation was determined in accordance with the prescribed formula, and voluntarily paid without legal compulsion and before suit was filed.
>
> If any amount of good faith will excuse the payment of liquidated damages imposed by Section 16(b), it would seem wholly justified by the unchallenged factual findings of the trial court, but here the overtime compensation was not paid when due in the regular course of employment, because the parties did not believe it was owing. The violation was committed in good faith based upon a mistake of law. It was nevertheless a valid obligation, created by the applicable law, and failure to discharge it in accordance therewith constituted a violation of Sections 6 and 7 of the Act. Liquidated damages granted by Section 16(b) for violations of Sections 6 and 7 of the Act are mandatory, and not discretionary with the courts. It follows that courts are not authorized to exercise judicial discretion based upon good faith violations."

The employer in the Fourth Circuit and the employer in the Tenth Circuit each paid full overtime before being sued. Each payment was intended to be payment in full. Each employer was later sued for liquidated damages and attorneys fees. One was held liable, the other was not.

Although the Fourth Circuit attempted to avoid the appearance of direct conflict with the decision of the Tenth Circuit in the present case by suggesting that here the employee did not accept the employer's payment in full settlement, the opinion of the Tenth Circuit shows that this was not the ground for its decision and that a direct conflict does exist between the Circuits.

Not only is there a conflict between two Circuit Courts of Appeals, there is a decided lack of uniformity of decisions of other courts throughout the country.

There are decisions of a number of courts, including state courts of last resort, consistent with the decision of the Circuit Court of Appeals for the Tenth Circuit. Other decisions of equal importance are in accord with the decision of the Circuit Court of Appeals for the Fourth Circuit.

Decisions in agreement with the Circuit Court of Appeals for the Tenth Circuit are:

Emerson v. *Mary Lincoln Candy, Inc.*, 173 Misc. 531 (1940), affd. 261 App. Div. 879; 287 N. Y. 577 (1941);

Rigopoulos v. *Kervan*, 47 Fed. Supp. 576 (United States District Court for the Southern District of New York, 1942);

Colan v. *Wecksler*, 45 Fed. Supp. 508 (United States District Court for the Southern District of New York, 1942);

Abroe v. *Lindsay Bros.*, 211 Minn. 136 (Minnesota Court of Appeals 1941);

Philpott v. *Standard Oil Company of New Jersey*, 7 Labor Cases 61,697* (United States District Court for the Northern District of Ohio 1943).

* Not officially reported. Reported in Commerce Clearing House Labor Cases.

Decisions in accord with the decision of the Circuit Court of Appeals for the Fourth Circuit are:

J. F. Schneider & Son v. *Justice*, 293 Kentucky 126 (Kentucky Court of Appeals 1943);

David v. *The Atlantic Company*, 26 S. E. (2d) 650 [not officially reported] (Georgia Court of Appeals 1943);

Cissell v. *The Great Atlantic & Pacific Tea Co.*, 37 Fed. Supp. 913 (United States District Court for the Western District of Kentucky 1941);

Kidd v. *Royal Crown Bottling Co.*, 6 Labor Cases 61,385* (Court of Appeals [Eastern District of the State of Tennessee] 1942);

Ortiz v. *Compania Cervecera*, 6 Labor Cases 61,484* (United States District Court for the District of Puerto Rico 1943).

This is an important question of Federal Law which has not been, but should be, settled by this Court. Thousands of employers and employees are concerned with the present issue. The Regional Director of the Wage and Hour Division in the New York area has estimated that there are approximately seven hundred suits under the Fair Labor Standards Act presently pending in the states under his administration. Of this number it is estimated that not less than one hundred fifty involve the issue which is here under discussion. When we remember that a considerable number of plaintiffs frequently join in a single suit, that there are undoubtedly many other cases brought which have not come to the attention of the Regional Director and further, that for each suit brought there are undoubtedly many more disputes which have not reached active litigation, it becomes clear that there are thousands of em-

* Not officially reported. Reported in Commerce Clearing House Labor Cases.

ployers and employees directly concerned with this issue in the New York area alone.

Under the conclusion reached by the Circuit Court of Appeals for the Tenth Circuit, an employer who voluntarily complies with the statute and who makes litigation unnecessary by paying all of the overtime due to his employee will be liable for the penalty if such payments are not made currently. His penalty for voluntary compliance when he discovers his error will be as great as that of an employer who refuses to comply with the Act until his employee has engaged counsel and carried his case through the courts.

But whether the Tenth Circuit or the Fourth Circuit is correct is not now the issue. In either case there should not be one rule in the Fourth Circuit and in Georgia, Kentucky and Tennessee, another rule in the Tenth Circuit and in Minnesota, New York and Ohio.

This Court should issue the Writ of Certiorari and settle this important question.

Respectfully submitted,

JOSEPH V. LANE, JR.,
Amicus Curiae.

ADRIAN C. LEIBY,
Counsel.

APPENDIX

Sections 7(a) and 16(b) of the Fair Labor Standards Act of 1938 read as follows:

Section 7(a)

"Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 16(b)

"Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

(48)

No. 222

In the Supreme Court of the United States

October Term, 1943.

SENECA COAL AND COKE COMPANY, *Petitioner,*

vs.

MILO LOFTON, *Respondent.*

Reply to Petition for Writ of Certiorari.

HAYES McCOY,
Attorney for Respondent.

W. L. SHIREY,
Of Counsel.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1943.

No. 222

SENECA COAL AND COKE COMPANY, *Petitioner,*

vs.

MILO LOFTON, *Respondent.*

REPLY TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Supreme Court of the United States:

The above named respondent, Milo Lofton, has the honor to reply to the petition of the Seneca Coal and Coke Company for a writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit and prays this Honorable Court to consider the argument and authorities herein set forth as an answer to said petition.

Statement of the Case.

The petitioner has correctly stated the substance of the evidence and the general issues involved in this case. We have no new propositions of law to submit but expect to rely upon the same authorities presented by the petitioner to uphold the decision of the Circuit Court of Appeals.

It is the respondent's earnest conviction that there is no conflict in the decisions cited by the petitioner; that the

holding and decision of the Circuit Court of Appeals presents no question of federal law which has not been settled by this court; and that the federal questions decided therein were not in conflict with the applicable decisions of this court.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

Answer to Petitioner's Proposition I.

Without quoting the proposition of law upon which petitioner relies as his Specification of Error No. 1, it is the position of the respondent that the authorities cited, quoted and relied upon by the petitioner are conclusive against his contentions in this appeal.

If the theory of the petitioner were correct and sound, the provisions of Section 7 of the Fair Labor Standards Act would be nullified and only minimum wages, established by Section 6, would be regulated by the act. It is elementary to state that the purpose of the enactment of the Fair Labor Standards Act (herein referred to as the act) was to provide maximum hours, as well as minimum wages, for all employees engaged in interstate commerce or in the production of goods for commerce, as defined in said act. The duality of purpose of the Congress is clearly shown by the reports of both the House and the Senate. (See House Rep. 1452, 75th Cong., 1st Sess., pp. 14, 15; 83 Cong. Rec. 9246, 9254.)

The Supreme Court of the United States and several Circuit Courts have held that the object of the act was not

only to raise sub-standard wages but also to require extra pay for overtime work by those covered by the act, even though their hourly wages exceeded the statutory minimum. *Overnight Motor Transportation Company, Inc.*, v. *William H. Missel*, 316 U. S. 572, 62 Sup. Ct. 1216, 86 L. ed. 1159; *L. Metcalfe Walling, etc.*, v. *A. H. Belo Corporation*, 316 U. S. 624, 62 Sup. Ct. 1223, 86 L. ed. 1166; *Mid-Continent Pipe Line Co., et al.*, v. *Hargrave*, (C. C. A. 10) 129 F. (2d) 655; *Bumpus* v. *Continental Baking Co.*, (C. C. A. 6) 124 F. (2d) 549; *Carleton Screw Products Co.* v. *Fleming*, (C. C. A. 8) 126 F. (2d) 537.

Computation of Overtime.

So many courts have passed upon the method of computing the regular rate of pay, in the manner followed by the Tenth Circuit Court in the case at bar, that it appears unnecessary to discuss at greater length the manner in which the overtime rate of pay or the assimilation of straight time and overtime compensation may be made where there was no agreement, express or specific, made between contracting parties concerning the segregation of straight time from overtime payments. Anomalous as it may seem, we contend that the case cited by petitioner (petitioner's brief, pp. 13-14) are authoritative announcements by this court and the Circuit Courts against the theory of the petitioner. We believe that a proper analysis of these decisions was made by the Circuit Court in the instant case, and that this court will follow its previously announced decisions and deny petitioner's application for the writ.

Implication in the Employment Contract.

If compliance with the act can be presumed against the express findings of the court that no expressed intention was made to provide a regular hourly rate or for a division of the agreed salary and the agreed work hours into regular and overtime compensation, it would be difficult to imagine a case where an employer would ever be guilty of violating the act if he paid wages in excess of the statutory minimum wage when a regular rate of pay has been ascertained in the manner done by the petitioner in this case.

In *Overnight Motor Transportation Company, Inc.*, v. *William H. Missel* (hereinafter referred to as the *Missel* case), *supra,* the employees were under a fixed weekly wage, whereas, in this case the respondent was on a monthly salary for regular contract hours. The facts are so analogous to those in the case at bar that we consider the following quotation from the *Missel* case to be particularly appropriate to this discussion:

> "Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or 'regular rate,' regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which the petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. *Implication can-*

not mend a contract so deficient in complying with the law. * * *'' (Italics and asterisks ours.)

In *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. (2d) 42, aff. 317 U. S. 88, 87 L. ed. 99 (Adv. Sheet), the plaintiffs were working for a daily wage in contrast to the instant case. The question of implication was given only "slight consideration." This court used the following language:

> "One final contention merits but slight consideration. Respondents were employed on the basis of an eight-hour day and regularly worked seven days a week, receiving fixed wages ranging from $6.50 to $11.00 per day. There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours. Petitioner urges that it complied with the overtime compensation requirements of the act because respondents received wages in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours, which wages respondents impliedly agreed included overtime compensation by accepting them. A similar argument was squarely rejected in *Overnight Motor Co.* v. *Missel,* 316 U. S. 572."

Patsy Oil & Gas Co. v. *Roberts,* 132 F. (2d) 826, decided by the Tenth Circuit January 6, 1943, is squarely in point with our case. Circuit Judge MURRAH rejected the theory of petitioner on the question of implication and stated as follows:

> " * * * we think it is now abundantly clear from the adjudicated decisions that in the absence of a contract or agreement specifying a basic hourly rate of pay, not less than the statutory minimum, and not less than time and one-half that rate for every hour of overtime work beyond the maximum hours fixed by the act, see *Walling* v. *Belo Corporation,* 316 U. S. 624, 634 (5

WHR 453), the basic hourly rate or the regular rate is ascertained by the application of the formula used by the trial court in computing overtime compensation, and this formula applies whether the hours are 'certain or variable.' *Overnight Motor Transportation Company* v. *Missel, supra; Mid-Continent Pipe Line Co.* v. *Hargrave, et al.*, 129 F. (2d) 655; *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42, affirmed 87 L. ed. 99.

"It is further contended that the parties contemplated compliance with the act, and to that extent the applicable provisions entered into and became a part of the employment contract, hence the fifty-six hour workweek included the forty-four hour statutory workweek and twelve hours overtime, for which the employee was paid an amount in excess of the statutory minimum wage for the statutory workweek, plus time and one-half that rate for the overtime hours worked beyond the statutory maximum. It is urged that such an agreement meets the statutory requirements.

"It may be conceded that the hours worked in excess of the statutory maximum to be considered as overtime hours, and that the employer intended to compensate the employee therefor at the rate of time and one-half the regular rate. But in the absence of a specific agreement, the regular rate is not the statutory minimum for the purpose of computing overtime compensation. There is no such agreement here and the statute will not supply it. In these circumstances, the regular rate is the wages divided by the hours worked, whether certain or variable. See *Overnight Motor Transportation Company* v. *Missel, supra;* cf. *Walling* v. *Belo Corporation, supra.*"

This same argument was presented and rejected by the Seventh Circuit Court of Appeals on November 25, 1942, in the case of *Walling* v. *Stone*, 131 F. (2d) 461. On page 463 the following language is used by the court:

"It is true that in our case the court found that the defendants and their employees intended that the fixed weekly rates of compensation cover regular and overtime work. *Even so, that alone would not be sufficient to comply with the act; such a general intention may not be transformed by implication into a specific intention that overtime be paid for at time and a half the regular rate, Missel case, supra.* Consequently, the fixed salary contracts here involved did not comply with the provisions of Section 7 of the act. Compare *Warren-Bradshaw Drilling Co.* v. *Hall, et al.*, decided by the Supreme Court, November 9, 1942 (87 L. ed. 99)." (Italics ours.)

It is interesting to note the analysis of the *Missel* case by the writer, Circuit Judge KERNER, in *Walling* v. *Stone, supra.* His opinion states (pages 462-463) as follows:

"In that case, as in the instant case, the contract of employment provided for the payment of a fixed salary regardless of the hours worked. There, as here, during the weeks in question the fixed salary was greater than an amount calculated at the statutory minimum hourly rate (with time and one-half for overtime) for the hours actually worked. Missel brought a statutory action to recover alleged unpaid overtime compensation. The Supreme Court held that the contract did not comply with the requirements of Section 7 of the act and pointed out that two elements are essential in a contract of employment in order to comply with the act: *(1)* either a stated hourly rate for regular work, or an upper limit on the total number of hours to be worked for a fixed salary, and *(2)* an express provision that overtime should be paid for at time and one-half the regular rate. If the first element is absent from a contract, the hours worked might require minimum compensation greater than the fixed wage; if the second is absent, overtime work could be paid for at

> any rate equal to or greater than the ergular rate. Thus, neither of these elements alone is sufficient for compliance with the law—both must be present. In the case at bar both are absent. * * *''

In another case decided by the Seventh Circuit on the same day the *Stone* case, *supra,* was decided, the effect of a wage agreement was considered by the court. It was the case of *Murray* v. *Noblesville Milling Company,* (C. C. A. 7) 5 WHR 949, 131 F. (2d) 470. After stating that the intent of Congress was not only to reinforce employee bargaining power "by prohibiting wage rates below a certain level," but also to reinforce employee bargaining power concerning hours of labor by exerting "financial pressure upon the employer to limit hours to a certain level," the court concludes that the contract in question contravenes the second of those purposes.

The opinion, also written by Circuit Judge KERNER, says, page 473:

> " * * * So far as the employer is concerned, the contract is in practical effect a contract to pay 40 cents an hour for the first 60 hours of work in a week, and 51 cents an hour thereafter. Instead of financial pressure being exerted upon the employer after the statutory maximum number of hours of work, the pressure of increased wages is exerted only after a certain number of hours chosen by the employer himself—60 hours. Because there is no increase of labor cost between the statutory maximum and the hours guaranteed, the employer has a financial inducement to require hours beyond the statutory maximum. Is this the result intended by Congress? Such a contract complies with the provision of Section 7 only in form, and even then only if 'regular rate' is given the definition contended for

by defendant. It is the substance of the contract, rather than its mere form, which should determine whether it complies with the act."

The court's statement concerning the employment contract in the *Murray* case, *supra,* is peculiarly applicable to the instant case. We adopt its statements as part of our argument against petitioner's theory of implication. The court said:

> "To hold that this contract is sufficient under the act is to render wholly ineffective (except in the unusual case in which the stated hourly rate is the statutory minimum) the method adopted by Congress to regulate hours of work. It is to construe the act as though Congress had not enacted a separate section dealing with maximum hours, but had enacted Section 7 as a part of Section 6, intending the time and a half provisions to influence only minimum wages, not maximum hours."

Answer to Petitioner's Proposition II.

It is respondent's contention that a refutation of petitioner's first proposition is also a conclusive answer to this point of law. Petitioner's reasoning appears to be as follows: The employer and the employee, without expressly considering the applicability to their contract, intended generally to comply with the law; they intended generally that the wage paid the employee should be in full for all hours actually worked; therefore, such general intention may be transformed by implication into a specific intention that overtime be paid for at time and one-half the regular rate at which the employee was paid. There are a few

cases which we wish to cite to show the fallacy of the petitioner's argument on that point.

In the case of *Murray* v. *Noblesville Milling Company, supra,* the Circuit Judge of the Seventh Circuit, Judge KERNER, took occasion to discuss a similar contention to that interposed by the petitioner in the case at bar. His statement is particularly apropos here:

> "It has also been argued that the courts must give effect to the intention of the parties with respect to the regular rate of pay. *However, our duty is to give effect to the intention of the parties only in so far as that intention complies with the law.* In many familiar situations the intention of the parties is not permitted to defeat the announced policy of the legislature. Regardless of the intention of the borrower, money may not be loaned at a usurious rate of interest; regardless of the intention of the employee, an employer may not pay him wages less than the applicable minimum wage; regardless of a woman employee's intention, an employer may not require her to work more than the number of hours set by state statute. *The intention of the parties should not be allowed to defeat the obvious intent of Congress in enacting the Fair Labor Standards Act.*" (Italics ours.)

It will be noted from petitioner's brief that the finding of the court to the effect that both parties intended to comply with the law is particularly stressed. This point has also been settled by the Seventh Circuit Court adversely to petitioner's position in the case of *Walling* v. *Stone, supra.* We find the following words from the opinion of Circuit Judge KERNER:

> "It is true that in our case the court found that the defendants and their employees intended that the

fixed weekly rates of compensation cover regular and overtime work. Even so, that alone would not be sufficient to comply with the act; *such a general intention may not be transformed by implication into a specific intention that overtime be paid for at time and a half the regular rate, Missel case, supra.* * * *" (Italics ours.)

We respectfully submit that the case of *Walling* v. *Stone, supra,* is a stronger case on the facts than the instant case, even though the trial court did find that neither party to the contract intended to violate the law. There was no finding or even a general intention that the monthly salary paid respondent should include both straight time and overtime compensation. In fact, the findings of the court (F. 13, 19, 25; R. 68, 70, 72) implied the exact opposite conclusion.

It is important in considering the intention of the parties to this case to note that in the findings of the court there is not a scintilla of evidence that either party ever at any time mentioned the existence of the Fair Labor Standards Act to the other; that there was no discussion whatsoever concerning the number of hours allowed under the maximum work week, provided for in Section 7 thereof; and, even though the respondent had been working for the petitioner approximately twelve years prior to the passage of the act, there was nothing in their course of dealing, conversations or correspondence to indicate whether or not either party gave oral or mental assent, reference or consideration to the terms of the act or had any general or specific intention to conform their contractual liabilities to the specific provisions thereof. It is fundamental that no person

can contract with reference to facts or law concerning which he has no knowledge.

Petitioner's Formula for Computation of Regular Rate of Pay.

Both lower courts had occasion to consider the formula of petitioner (Br., pp. 22-23) by which the regular rate of pay is determined as being sufficient to include straight time and overtime compensation for all hours worked by the respondent. It is not surprising that both the District Court and the Circuit Court of Appeals repudiated the formula, which graphically portrays the fallacy of their argument concerning implication. It is quite obvious that any salary received by the respondent for any hours worked in the workweek could be shown, under petitioner's formula, to comply with the act. It is perfectly obvious that the hourly rate of $0.3791 for straight time compensation and the rate of $0.5686 for overtime compensation per hour are both fictitious rates of pay based upon a presumption antagonistic to the decisions of both courts. Furthermore, the formula is merely a graphic portrayal, in figures, of the fallacy of "begging the question" into which the petitioner has fallen in his entire argument on implication.

In order to demonstrate, conclusively, the *petitio principii of* petitioner's syllogism, let us assume the hypothesis that the respondent worked an extra day of fourteen hours during the workweek to which said formula is made applicable. Under petitioner's formula, the respondent would be paid overtime for only six hours and straight time for eight hours, whereas, his actual compensation should be fourteen hours overtime, or the formula would be required to be

changed for the particular workweek. In that event, the straight time and overtime rate of pay would be another fictitious set of figures to which neither party agreed nor consented.

It is very evident that if the respondent were paid $1,200.00 per year, for example, instead of the salary as found by the court, the hourly rate for forty-four hours statutory weekly straight time, under petitioner"s formula, would be only slightly more than twenty-two cents per hour. Manifestly, this would be below the minimum wage for even the first year from the effective date of the act. We have seen from decisions heretofore cited that such an agreemnt would violate Section 6 of the act even conceding, for purposes of argument, that the overtime provisions were not violated.

This hypothesis clearly demonstrates how unsound is the reasoning of petitioner, as shown by its formula.

If the argument of the petitioner is sound and its formula is valid for the purpose used, there would be no circumstance under which an employer could be held liable for violation of the maximum hour provisions unless and until his regular rate of pay, computed under said formula, fell below the minimum wage provisions of Section 6 of the act; assuming, under the above state of facts, that the agreement was not in accordance with the form of contract approved in the *Belo* case.

Answer to Petitioner's Proposition III.

In considering the point of law raised by petitioner in his third proposition, it is well to remember that the act

does not require an employee to make demand for his overtime compensation or unpaid minimum wage. It is also worthy of note that the petitioner agrees that liquidated damages is mandatory upon the failure of the employer to pay overtime compensation in the event suit is instituted to recover the same. The only issue on this point seems to be whether or not Section 7 was violated when the petitioner failed, refused or neglected to pay the overtime compensation for a period of eighteen months to more than two years after it became due in the regular course of business.

The petitioner apparently relies upon the fact that it did not know that the activities of the respondent were covered by the provisions of the act. It would be absurd to state that there was any mistake on the part of the petitioner or the respondent concerning any material *fact* of the employment relationship or the nature of the duties of the respondent. Manifestly, the only excuse petitioner may have for failure to pay the overtime compensation on the regular pay days, when it became due, was that it was under the apprehension that respondent was not engaged in production of goods for commerce. By all the decisions applicable thereto it would seem that this was a *mistake of law* and not of fact. Can petitioner escape the consequences of its failure to comply with the law on the grounds that it did not know the respondent was entitled to overtime pay? Suppose, for example, suit had been instituted by the respondent when his cause of action was admittedly barred by the state statute of limitations. Is it reasonable to presume that the petitioner would fail to plead the statute as a bar to its claim if it were shown that the respondent did not know of his rights until after the claim was barred by lapse of time? The cases

are too numerous for citation that statutes of limitation are statutes of repose, and claims for money had and received, and the other common law counts related thereto, are prescribed without regard to the knowledge or lack of knowledge of the claimant concerning his rights in the premises.

Payment Within a Reasonable Time.

It will be observed from the court's findings (F. 26, R. 73) that the overtime compensation "was not paid on the regular pay days when it became due and that failure to pay the same prior to the time it was actually paid, as hereinabove found, constituted a violation of the Fair Labor Standards Act * * *." It is the contention of the respondent that this quoted finding was a finding of fact which is conclusive on appeal because it is not mixed with any question of law whatsoever. To hold that liquidated damages is not payable under these circumstances would, in effect, require the employee in every case to demand his overtime compensation whether or not he knew he was entitled to it by the terms of said act.

It will be observed that the court does not conclude, as a matter of law, that the payment of overtime compensation must be made on regular pay days in order to evade liability for liquidated damages. This construction seems to have been placed upon the decision of the lower court in the petitioner's brief. We contend that such a conclusion is unwarranted and wholly foreign to the general purport of both lower courts' decisions.

The employer, in effect, admitted the obligation for overtime compensation when it paid it to the employee, more than eighteen months after part of the work was done.

It will be observed that nearly 85 per cent of the overtime wages paid respondent was paid more than two years after the obligation arose (Finding 23, R. 72). Assuming, for the purpose of argument alone, that "reasonableness of time must be determined by the circumstances of the particular case," would not the court, sitting as a jury in the trying of the facts, be eminently justified in holding that more than two years was an unreasonable time for the employer to delay paying overtime compensation to the employee?

Mistake of Law.

Under the judicial definition of "mistake of law" the petitioner is without excuse for failure to pay overtime compensation and, *a fortiori,* is liable for liquidated damages under Section 16(b) of said act.

Oklahoma courts have defined "mistake of law" as follows:

> "A 'mistake of law' happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon the facts as they really are."
>
> —*Barnett* v. *Douglas,* 102 Okl. 85, 226 Pac. 1035, 39 A. L. R. 188;
>
> *Palmer* v. *Cully,* 52 Okl. 454, 153 Pac. 154, 158, Ann. Cas. 1918E, 375;
>
> *Cf., Smith* v. *Stevens,* 84 P. (2d) 3, 5;
>
> *Campbell* v. *Newman,* 51 Okl. 121, 151 Pac. 602;
>
> *Watashe* v. *Tiger,* 88 Okl. 77, 211 Pac. 415.

In 12 Am. Jur., Contracts, at Section 140 may be found these words:

"* * * The general rule is commonly said to be that a mistake of law does not effect the validity of a contract where there is no mistake of fact. *Upton* v. *Tribilcock,* 91 U. S. 45, 23 L. ed. 203; *Bank of United States* v. *Daniel,* 12 Pet. (U. S.) 32, 9 L. ed. 989; *Hunt* v. *Rhodes,* 1 Pet. (U. S.) 1, 7 L. ed. 27." (And other cases cited therein.)

In discussing the legal maxim *ignorantia legis neminem excusat,* an early case by this court stated as follows:

"The maxim results from the extreme difficulty of ascertaining what is, bona fide, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public."

—*Barlow* v. *United States,* 7 Pet. (U. S.) 404, 411, 8 L. ed. 728.

The decisions are practically unanimous in holding that the payment of liquidated damages is mandatory where employees have brought suit for unpaid overtime compensation, even though the employer settled on the receipts furnished by the Wage and Hour Division.

—*Overnight Motor Transportation Co.* v. *Missel, supra;*

Mid-Continent Pipe Line Co. v. *Hargrave, supra;*

Warren-Bradshaw Drilling Co. v. *Hall, supra;*

Abroe v. *Lindsay Bros. Co.,* (Minn. Sup. Ct.) 300 N. W. 457;

Emerson v. *Mary Lincoln Candies, Inc.,* (N. Y. Sup. Ct.) 20 N. Y. S. (2d) 570, 174 Misc. 353;

St. John v. *Brown,* 38 Fed. Supp. 385;

Williams v. *General Mills,* 39 Fed. Supp. 849;

Muldowney v. *Seaberg Elevator Co.,* 39 Fed. Supp. 275;

Thompson v. *Daugherty,* 40 Fed. Supp. 279;

LeFevers v. *General Export Iron & Metal Co.,* 36 Fed. Supp. 838;

Magann v. *Long's Baggage Transfer Co.,* 39 Fed. Supp. 742;

Robertson v. *Argus Hosiery Mills, Inc.,* (C. C. A. 6) 121 F. (2d) 285, cert. den. U. S. Sup. Ct., 304 U. S. 681.

At least two cases held that liquidated damages are due at the time the straight time wages become due. *Barrineau* v. *Carolina Milling Company,* 5 WHR 921 (U. S. D. C., E. D. of So. Carolina, Oct. 16, 1942); *Shannon* v. *Boh Bros. Construction Company,* (La., 1942) 8 So. (2d) 542, 5 WHR 362; *Cf., Johnson* v. *Phillips Buttorff Mfg. Co.,* (Tenn.) 160 S. W. (2d) 893, cert. den. U. S. Sup. Ct., Oct. 12, 1942, ... U. S. ..., and *Emerson* v. *Mary Lincoln Candies, Inc., supra.*

The courts, moreover, are practically unanimous in holding that the employer's good faith or lack of willfulness or intention to violate the act is immaterial as to liability. *Missel* case, *supra; Emerson* v. *Mary Lincoln Candies, Inc., supra,* and cases cited. The only case we have been able to find that denies liability for liquidated damages where the employer was in good faith in his violation is the case of *Clour* v. *Jones,* 42 Fed. Supp. 700 (E. D. Okla., 1941).

Answer to Petitioner's Proposition IV.

Under this proposition, the petitioner apparently seeks to evade the operation of the act upon the respondent's duties by attempting to show that it was excused from obeying the provisions of this act because of a decision by this court

which had been expressly repudiated by Congress three years after the decision of *James Walter Carter* v. *Carter Coal Company,* 298 U. S. 238, 80 L. ed. 1160.

The petitioner seems to assume that it had a vested right to enter into a contract the obligation of which was impaired by the enactment of the Fair Labor Standards Act.

Petitioner cites the case of *Jackson* v. *Harris,* 43 Fed. Rep. (2d) 513, 516, for the statement that "where contracts have been entered into or rights acquired upon the faith of a decision, they cannot be impaired by a change of construction made by a subsequent decision."

Crigler v. *Shepler,* 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (NS) 500, holds that "a person who is not a party or privy in the action cannot acquire a vested right in an erroneous decision made therein."

In *Haskett* v. *Maxey,* 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379, the following rule of law is announced:

> "The decisions of a court of last resort, the authorities assert, are not the law, but are only the evidence or exposition of what the court construes the law to be, and in overruling a former decision by a subsequent one the court does not declare the one overruled to be bad law, but that it never was the law, and the court was therefore simply mistaken in regard to the law in its former decision. The first decision, upon the point on which it is overruled, is wholly obliterated, and the law as therein construed or declared must be considered as though it never existed, and that the law has always been as expounded by the last decision."

It is quite apparent that the petitioner is making its argument upon a fact situation entirely different than the

one present before this court. In every instance where the doctrine of *stare decisis* has been relied upon as a defense, the subsequent decision of the court of last resort has changed its decision upon the identical statute construed in the original opinion. In this case, however, subsequent to the decision in the *Carter Coal Company* case, *supra,* Congress enacted the Fair Labor Standards Act. This fact alone removes this case from the general circumstances under which *stare decisis* is employed.

Furthermore, there is no contention by the petitioner, and neither could it be successfully interposed by anyone, that the Fair Labor Standards Act attempts to be retroactive in its operation. Therefore, it is apparent that whatever rights have been vested by the decision in the *Carter Coal Co.* case can no longer be claimed subsequent to October 24, 1938, the date said act became effective. Subsequent to the aforesaid date, the petitioner had no right to presume or rely upon the decision of this court in the *Carter Coal Company* case.

In 16 C. J. S., Const. Law, Section 275, we find this interesting and appropriate discussion of the law applicable to the fact situation before this court:

> "The Law Impairing the Obligation. Sec. 280. *Judicial Decisions.* Constitutional prohibitions against impairing the obligation of contracts apply only to legislative and not to judicial action.
>
> "Although a number of cases, induced by a *dictum* in an early U. S. Supreme Court opinion, *(Ohio L. Ins., etc., Co.* v. *Debolt, Ohio,* 16 How. 416, 14 L. ed. 907) have held in general terms, that constitutional prohibitions against 'impairing the obligation of contracts'

are violated by a judicial decision which overrules previous decisions and thereby impairs the obligation of a contract under the law as construed when it was made, it is now definitely and authoritatively settled that such prohibitions in federal and state constitutions relate to legislative action and not to judicial decisons * * *. Nor does a mere change in judicial decisions come within such prohibition, even though it invalidates a contract previously sustained or impairs the validity of a contract made in reliance on prior decisions. *McCray* v. *Miller,* 186 Pac. 1087, 78 Okl. 16, denying rehearing 184 Pac. 781, 78 Okl. 16. See *Tidal Oil Company* v. *Flanagan,* 44 Sup. Ct. 197, 263 U. S. 444, 68 L. ed. 382, dismissing error 209 Pac. 729, 87 Okl. 231; *Storrie* v. *Cortes,* 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666; 12 Am. Jur., Sec. 398, p. 26. Annotation: 85 A. L. R. 262."

In 11 Am. Jur., Const. Law, Section 151, page 832, on the subject of Validation of Unconstitutional Statute, these words may be found:

"While it has been broadly stated that an unconstitutional act cannot be validated by the legislature, it seems that it may be amended into a constitutional one so far as its future operation is concerned by removing its objectionable provisions, or supplying others, to conform it to the requirements of the Constitution. The distinction seems to be that where a statute is invalid by reason of an absence of power in the legislature in the first instance under the Constitution to enact the law, it is not possible for that body to confirm or render the same valid by amendment; but where the obnoxious features of the statute may be removed or essential ones supplied by a proper amendment, so that had the law been primarily thus framed it would have been free from the objections existing against it, then the statute may be rendered valid by amendment, so far as its future operation may extend."

It is elementary that every regularly enacted legislative act will be presumed to be valid and constitutional until it has otherwise been declared by a competent tribunal. (See 16 C. J. S., Const. Law, Sec. 99, p. 250 and cases cited therein; 11 Am. Jur., Const. Law, Sec. 128 and cases cited.)

The petitioner seems to take the position that the doctrine of *stare decisis* would be applicable as a defense against liability for liquidated damages but not against unpaid overtime compensation. In view of the holding of this court, and many inferior courts, to the effect that liquidated damages is mandatory under Section 16(b) of the act, it seems logical to infer that the petitioner is calling upon the equitable powers of this court to relieve it from an alleged hardship which it created in its failure to pay the respondent according to the mandated provisions of said act. We feel sure that this court will not give consideration to this irregular method of petitioner in reaching its objective sought.

Conclusion.

We respectfully submit that the writ of *certiorari* should be denied.

Respectfully submitted,

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